No. 14,863

IN THE

United States Court of Appeals

For the Ninth Circuit

UNITED PRESS ASSOCIATIONS, a corporation,

Appellant,

vs.

SIDNEY DEAN CHARLES, PAUL S. CHARLES, PATRICIA CHARLES and the PIONEER PRINTING CO., a corporation,

Appellees.

Upon Appeal from the District Court for the District of Alaska, First Division.

BRIEF FOR APPELLANT.

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JURISDICTION.

This is an action, tried before a jury, in which appellant sued appellees for damages for breach of contract in the amount of $21,489.57. (R. 3.) On April 15, 1955, the jury rendered its verdict in favor of appellant, awarding damages in the amount of $368.70. (R. 35.) Judgment was entered on April 22, 1955 (R. 37-38), and on April 25, 1955, appellant filed its motion under Rule 59, Federal Rules of

Civil Procedure, to open and set aside the judgment or, in the alternative, for a new trial. (R. 39-40.) This motion was denied by the District Court by minute order entered on May 20, 1955. (R. 41.)

An appeal was taken on June 10, 1955, by filing with the District Court a notice of appeal. (R. 41.) The jurisdiction of the District Court rests upon the Act of June 6, 1900, 31 Stat. 322, as amended, 48 USCA Sec. 101; the jurisdiction of this Court, on Sec. 1291 of the new Federal Judicial Code.

QUESTIONS PRESENTED.

1. Whether the trial Court committed reversible error in ordering that this action be tried by a jury—in the presence of a waiver of jury trial by appellees and the absence of a demand therefor by either party.

2. Whether the damages awarded appellant by the jury were so wholly inadequate as to lead to one or more of these conclusions:

(a) That the jury simply ignored the uncontroverted evidence before it and arbitrarily assessed damages in such a manner that appellant would take nothing from the litigation—thus giving rise to an inference of prejudice on the part of the jury.

(b) That such inadequacy of damages stems from errors in certain of the court's instructions to the jury.

(c) That the jury failed to follow other of the Court's instructions.

3. Whether the damages awarded appellant were so totally inadequate that the trial Court's refusal to either enter judgment for appellant for the correct amount of damages or to grant a new trial was such an abuse of discretion as to be reviewable by this Court.

4. Whether this Court should modify and increase the judgment below so as to allow appellant damages in the amount established by the uncontradicted evidence, or whether this Court should grant a new trial to be restricted solely to the issue of damages.

STATEMENT.

On or about June 30, 1945, appellees, Sidney Dean Charles, Paul S. Charles and Patricia Charles, a partnership doing business under the name of "Alaska Fishing News", entered into a written contract with appellant, United Press Associations, a New York corporation engaged in the business of accumulating and disseminating news reports to newspapers and radio stations. Under the terms of this contract, appellant agreed to furnish its regular news report to appellees for use in their newspaper published at Ketchikan, Alaska, and appellees agreed to pay for such news report a specified sum of money each week. (R. 3-18.) Appellee, Pioneer Printing Co., an Alaska corporation, is the successor to the Charles' partnership, and on or about April, 1948, this corporation took over the ownership and publication of the

Charles' paper—it being then and subsequently called the "Ketchikan Daily News." (R. 106.)

This contract, although originally for only a three-year term, was automatically renewed from time to time, and each of the parties performed its part of the bargain under the contract until about February 14, 1954, when appellees wrongfully and wilfully breached the contract by refusing to accept and pay for any further service. (R. 5, 58-59, 88.) At this time the term of the contract had been extended and would not have expired until September 27, 1962. (R. 4, 84-86.)

On April 23, 1954, appellant commenced this action, demanding judgment for breach of contract in the amount of $21,489.57—this representing appellant's loss of profits, or the difference between the aggregate amount that appellant would have been entitled to receive under the contract and the costs to appellant of furnishing its news service to appellees during the unexpired term of the contract, i.e., from February 14, 1954, to September 27, 1962. (R. 7, 88-98.)

On May 15, 1954, appellees filed their answer to appellant's complaint (which included a counterclaim for certain drafts, totaling $368.70, inadvertently cashed by appellant) (R. 18-23), and on June 4, 1954, appellant served and filed its reply to the counterclaim—admitting the material allegations thereof, including the counterclaim. (R. 23-24.) Nearly two months later, on August 5, 1954, appellees moved for a jury trial—basing such motion upon Rules 38 (a) and 39 (b) of the Federal Rules of Civil Procedure.

(R. 24.) This motion was argued by the parties, and then denied by the District Court. (R. 25, 46-47.)

For the next five and one-half months nothing further was done in respect to this matter, and the case was eventually set down for trial, before the Court and not a jury, at Ketchikan, Alaska, on April 13, 1955. Two days prior to the trial date, i.e., on April 11, 1955, the Court suddenly and without prior notice to appellant decided on its own initiative that a jury would be summoned to try the case. The following day appellant's counsel, in open Court, voiced his objections to such action of the Court (R. 47-50), but the objections were not sustained and the Court on April 12, 1955, entered an Order as follows:

> "Since the denial on September 24, 1954, of the defendants' motion for a jury trial, editorials have appeared in the defendants' newspaper in defense of the judge of this court from attacks by Warren Taylor. I feel that in these circumstances I should not be the trier of the issues of fact in the foregoing case, and hence it is
>
> "Ordered, sua sponte, under Rule 39, F.R.C.P., that the case be tried by a jury." (R. 25.)

The case then proceeded to trial before a jury on April 13, 1955, and there two principal issues were to be determined:

(1) Whether appellees' breach of the contract was without justifiable cause—appellees' defense in this respect being that appellant had failed to furnish appellees with the type of news service agreed upon, and

(2) If appellees' breach were inexcusable, then what was the monetary amount of appellant's damages, or loss of profits.

With respect to the first issue, even though there was conflicting testimony, appellant introduced substantial evidence which proved that it had complied with the contract and had furnished an adequate news service, (R. 55-58, 62-63, 81-82, 190-200, 249-264); and on the second issue, appellant's loss of profits were shown by uncontroverted evidence to be $21,489.57. (R. 88-98.)

On April 15, 1955, the jury returned its verdict in favor of appellant, but for damages only in the amount of $368.70 (R. 35)—this being the precise amount mentioned in appellees' counterclaim, the allegations of which appellant had admitted. (R. 22-24.) Arguments were heard by the Court in Juneau on April 21, 1955, on the form of judgment to be entered (R. 205-215), and on April 22, 1955, judgment was entered by the Court. (R. 37-38.)

Thereafter, on April 25, 1955, appellant filed its motion under Rule 59, Federal Rules of Civil Procedure, requesting the Court to set aside the judgment of April 22 and to make its own independent Findings of Fact and direct entry of judgment for appellant in the amount alleged in the complaint and as established by the evidence at the trial, or, in the alternative, to order a new trial. (R. 39-40.) Without opinion, the Court denied this motion by a minute order entered on May 20, 1955. (R. 41.) This appeal followed. (R. 41.)

SPECIFICATIONS OF ERROR.

The District Court erred:

1. In making its order of April 12, 1955, in which it was ordered that this case be tried by a jury, and in permitting this case to be tried by a jury and not by the Court. (R. 25.)

2. With reference to Instruction No. 4 of the Court's Instructions to the Jury—

(a) In instructing the jury that the term of the contract, the subject of this action, would expire on September 27, 1957, rather than, as appellant maintains, on September 27, 1962. (R. 30.)

(b) In giving to the jury that portion of Instruction No. 4 which reads as follows:

> "In determining the amount of damages, if you find that plaintiff is entitled thereto, you may consider . . . the probability of change during the period referred to in the rates, the cost of doing business, and the margin of profit as well as the probability or improbability that the defendants would remain in business." (R. 30-31.)

3. (a) In entering its judgment of April 22, 1955, ordering that appellant take nothing by its complaint. (R. 37-38.)

(b) In failing and refusing to ignore the jury's verdict herein and to make its own independent Findings of Fact and Conclusions of Law. (R. 39, 41.)

(c) In failing and refusing to enter judgment for appellant for adequate and substantial damages,

as established by the evidence, and for appellant's costs and attorneys' fees. (R. 40, 41.)

4. In entering its minute order of May 20, 1955, denying appellant's motion under Rule 59, Federal Rules of Civil Procedure, to vacate the judgment or to grant a new trial. (R. 41.)

SUMMARY OF ARGUMENT.

I.

Appellees failed to demand a jury trial within the time allowed by Rule 38(d), Federal Rules of Civil Procedure, and then attempted to seek relief from their waiver by motion under Rule 39(b). (R. 24.) This motion was expressly denied by the Court below. (R. 25, 46-47.) In spite of this, however, the District Court, less than two days before the trial in this action and without prior notice to appellant, ordered a jury trial solely on its own motion. (R. 25.) The Court had no right to thus act *sua sponte,* and therefore this was error. *Hargrove v. American Central Insurance Company,* 125 F. 2d 225, 228-229. And this error was prejudicial because of the difference in the scope of appellate review between a jury and a non-jury case, *United States v. U. S. Gypsum Company,* 333 US 364, 394-395. Appellant on this appeal is asserting that the damages awarded by the jury were inadequate, and since a jury's verdict is involved it is not sufficient merely to show that a mistake has been made but it is necessary to establish

that the inadequacy was "gross". *Southern Pacific Company v. Guthrie,* 186 F2d 926, 932-933. (CA-9, 1951.)

II.

It was conclusively established by the evidence that when appellees repudiated the contract for appellant's news service on February 14, 1954 the value of the contract, that is, what appellant was entitled to receive under the contract, was $56.45 a week; the cost to appellant of furnishing this news service to appellees was $8.66 per week, which meant that appellant's net profits—lost by reason of the appellee's breach—was the sum of $47.79 a week; and the term of the contract would not have expired for a period of 449 and 4/6th weeks. Hence, appellant's damages, or lost profits, were the product of $47.79 and 449 and 4/6 or $21,489.57. *Star-Chronicle Publishing Company v. United Press Association,* 204 F. 217 (CA-8 1913); *United Press Association v. McComb Broadcasting Company,* 28 So. 2d 575 (Miss. 1947). But the jury awarded appellant only the sum of $368.70, the exact amount of appellees' counter-claim which had been admitted by appellant. Hence, it is readily apparent that the damages awarded were grossly inadequate.

III.

The District Court's instructions to the jury (R. 30-31) made this clear: that the jury had to find either that appellees had wrongfully breached the contract or that they were justified in rescinding it,

and if the former, that appellant would then have to be awarded substantial damages. The jury found by its verdict that appellees had wrongfully breached the contract, the correctness of which finding appellant does not challenge, but it failed to assess damages in the manner directed by the Court's instructions. This action by the jury was so obviously capricious and arbitrary that it was an abuse of discretion on the part of the trial Court to refuse to grant a new trial on the issue of damages. *United Press Associations v. National Newspaper Association,* 254 F. 284, 286 (CA-8, 1918); *Barnsdall Refining Corporation v. Cushman-Wilson Oil Company,* 97 F. 2d 481, 485 (CA-9, 1938).

IV.

The District Court gave the jury erroneous instructions—first, in shortening the unexpired term of the contract by a period of approximately five years (R. 30), and secondly, in failing to make clear to the jury that appellant's damages, or lost profits, were to be measured by the contract price less the expense of furnishing appellant's news report to appellees for the balance of the unexpired term of the contract (R. 30-31). See *United Press Associations v. McComb Broadcasting Corporation,* 28 So. 2d 575 (Miss. 1947). These were errors of law which could well have led to the absurd result here, that is, the award to appellant of only the sum of $368.70, the precise amount of appellees' admitted counter-claim. This alone would be sufficient reason for a reversal by this Court, *Chesapeake & Ohio Ry. Co. v. Gainey,* 241

U.S. 494, 496 (1915); *Legler v. Kennington-Saenger Theatres, Inc.,* 172 F. 2d 982, 984 (CA-5, 1949).

V.

When the jury returned its verdict in favor of appellant, it correctly decided that appellees had wrongfully repudiated the contract; and the evidence which justified this finding on the part of the jury had no connection with other evidence in the case which related to the profits which appellant lost by reason of such breach. Consequently, the issue of damages can be re-tried alone without any injustice, and in fact it would be an injustice and unduly burdensome to compel appellant to re-try the issue of liability, in view of the jury's verdict in its favor on that issue—the correctness of which appellant does not challenge. Therefore, a new trial should be limited solely to the issue of damages. *Yates v. Dann,* 11 FRD. 386 (D.C. Del. 1951); *Greater American Indemnity Company v. Ortiz,* 193, F. 2d 43, 47 (CA-5, 1951).

VI.

Appellant received a verdict in its favor, i.e., the jury decided that appellees were not justified in rescinding the contract; and since the evidence undisputably established the elements comprising appellant's damages, or what appellant lost by reason of appellees' breach, the amount that appellant ought to have been awarded was a mere matter of mathematical computation. Thus, since the amount of damages properly to be awarded was not factually in dispute, there is nothing to prevent this Court from entering judgment

for appellant for the disputed amount. This Court would not be substituting its own judgment for that of the jury, but would be merely adding to the verdict that amount of lost profits which appellant is entitled to as a matter of law. *Stanton Electric Manufacturing Company v. Klaxon Company,* 125 F. 2d 820, 825, 826 (CA-3, 1942); *Marshall v. Equitable Life Assurance Society,* 116 F. 2d 901, 903 (CA-6, 1941); *Moore's Federal Practice,* Vol. 6, pp. 3748-3749, Section 59.05 (3); id. p. 3755, Section 59.05 (4); id. p. 3804, Section 59.08 (4).

ARGUMENT.

I. THE ACTION OF THE TRIAL COURT IN HAVING THE CASE TRIED BY A JURY WAS ERROR.

At least two months after the service of the last pleading directed to any issue in this case triable of right by a jury, appellees—apparently realizing that they had waived their right to a jury trial by not making a demand therefor within the prescribed ten-day period (Rule 38 (d) F.R.C.P.)—sought relief from such waiver by filing a motion under the provisions of Rule 39 (b), F.R.C.P. (R. 24) This motion was argued by counsel for both parties, was considered by the Court, and was expressly denied. (R. 46-47, 25.) Hence, from that date on no other assumption could have been made by appellant than that the action would be tried by the Court alone.

From the date of the Court's denial of appellees' motion on September 24, 1954, and until April 11,

1955 (which was two days before the trial of the action), no indication was given that the action was to be tried other than before the Court. Suddenly, however, and without prior notice to appellant's counsel, the Court solely on its own initiative decided that a jury would be impanelled to try this case. (R. 25) Appellant's objections to this summary action (R. 47-50) were unavailing—the Court ordering that the action be tried by a jury and giving its reasons as follows:

> "Since the denial on September 24, 1954, of the defendants' motion for a jury trial, editorials have appeared in the defendants' newspaper in defense of the judge of this Court from attacks by Warren Taylor. I feel that in these circumstances I should not be the trier of the issues of fact in the foregoing case, and hence it is
>
> "Ordered, sua sponte, under Rule 39, F.R.C.P., that the case be tried by a jury." (R. 25.)

Appellant submits that this action by the District Court was capricious and arbitrary, and was prejudicial error sufficient to justify this Court in granting a reversal.

1. The District Court's Error in Ordering a Jury Trial.

Rule 38, F.R.C.P., preserves the right of trial by jury, but conditions the exercise of such right upon a party making a demand therefor. If such demand is not made within a prescribed time, then the right has been waived, and thereafter the issues in a case, even though they be such as to be triable of right by a jury, are to be tried by the Court. This requirement,

however, is subject to the provisions of Rule 39 (b) which read in part as follows:

> " . . . but, notwithstanding the failure of a party to demand a jury in an action in which such a demand might have been made of right, the Court *in its discretion upon motion* may order trial by jury of any or all issues." (emphasis added.)

Thus, in order for a party to be relieved from his waiver of a jury trial he must make a motion under Rule 39 (b), and the Court thereafter may grant such motion "in its discretion".

In this case it is submitted that there was neither (1) a "motion" which would justify the entry of the Court's order of April 12, 1955, to the effect that this action would be tried by a jury, nor (2) the exercise of a "discretion" in the making of such an order.

(a) Appellees had waived the right to have the issues in this case tried by a jury, and the Court on September 24, 1954, refused to relieve them from the effects of their waiver under the discretion vested in it by Rule 39 (b)—apparently, choosing to adhere to the practice of this Court sitting in Anchorage, as established in the case of *Beckstrom v. Coastwise Line,* 13 FRD 480, 483, 14 Alaska 140, 197-198. (R. 47) It was, then, not until practically the eve of the trial of this case that the Court, without any prior notice to the parties, ordered a jury trial. No motion for the same was made by appellees, nor can it be held logically that the Court was, in effect, merely changing its decision on the motion denied in September, 1954. The

record shows that appellees' counsel specifically stated that he made no motion for a jury trial "at this time", which obviously negatives any inference that he was, on April 12, 1955, renewing his motion made the previous Fall. (R. 49-50) Moreover, the Court stated expressly that the order was made "sua sponte", that is, on the Court's own initiative. (R. 25) Consequently, the Court's order was made not in accordance with the authority granted by Rule 39(b), for there it is clearly set out that in order to obtain relief from a waiver of a jury trial, there must be a motion, and this logically must refer only to a motion made by a party to an action and not to a motion of the Court itself. Rule 39(b) may be compared with Rule 39(c) where in certain cases the Court is authorized to impanel an advisory jury "upon motion *or its own initiative.*" The italicized words did not appear in Rule 39(b) and their omission compels the conclusion that the Court cannot act *sua sponte* under Rule 39(b).

That this is the proper meaning of Rule 39(b) is clear from an opinion of the Court of Appeals for the Tenth Circuit, decided in 1942, in the case of *Hargrove v. American Central Insurance Company,* 125 F. 2d 225, 228-229. In that case, a suit on insurance policies, neither party had at any time demanded a jury trial, but at the commencement of the trial the trial Court advised the parties that a jury would be impanelled in an advisory capacity. This was done and interrogatories were submitted to the jury, but at the conclusion of the case, after the jury's verdict

had been returned, the Court disregarded the verdict and made its own independent findings of fact, conclusions of law and decree. On appeal it was asserted that the trial Court had erred in calling a jury. The Court of Appeals, in speaking on this question, made it quite clear what Rule 39(b) meant. It said:

> (a) That the issues in the case, being basically legal in their nature, were triable of right by a jury.
>
> (b) That the parties were thus entitled to a jury as of right under Rule 38, but that if no demand is made in accordance with that rule, the right is waived.
>
> (c) That in spite of the waiver, the Court, in its discretion, upon motion of either party, could order a jury trial; but that it could not do so on its own initiative—even by calling a jury in a merely advisory capacity, since an advisory jury can only be called in actions "not triable of right by a jury."

From this it is clear that the Court did not have the authority on its own initiative to call a jury in any capacity when a jury has been waived, and in the absence of a motion from a party to the action. Under the circumstances of this case—the waiver of a jury trial by appellees, the absence of any motion for a jury, other than that denied in September, 1954, and the action by the Court in calling a jury, sua sponte —appellant was deprived of its right to have the cause submitted and tried by the Court alone.

(b) Neither, it is submitted, was the Court's action in ordering a jury done in the exercise of a "discretion" vested in it by Rule 39(b). When the motion of appellees' under this Rule was argued in September 1954, appellant cited to the District Court authority for the proposition that the exercise of the discretion of the Court must be based upon some circumstance warranting its exercise—otherwise it would constitute nothing more than an arbitrary act; and that such discretion should never be exercised unless there was in the record a showing of the existence of some plausible circumstance that would cause or justify the mind to act. See *Krussman v. Omaha Woodman Life Insurance Society,* 2 FRD 3; *Steiger v. Mullaney,* 8 FRD 486; *Arnold v. Chicago B & Q R. Co.,* 7 FRD 678, 680.

There simply was no "plausible circumstance" here that justified the action of the trial Court—even if there had been a motion by appellees for a jury trial. Appellant had nothing to do with the attacks on the Judge of this Court by Warren Taylor, nor with the editorial comment thereon which appeared in appellees' newspaper; and yet, merely because of these fortuitous circumstances, appellant has been deprived of its *right* to have the case tried by the Court—a right that appellant had relied upon from September 24, 1954, until the eve of the trial on April 12, 1955. The fact that the appellees chose to write editorials about the Judge of the District Court certainly did not constitute a reasonable or valid basis for that Court suddenly taking an action that could not help

but result in prejudice to appellant and in an advantage to appellees. The calling of a jury, then, at the last moment was not the exercise of a discretion but a mere arbitrary act. No authority for this is vested in the Court by Rule 39.

Moreover, because of the almost complete absence of prior notice, the calling of a jury was a matter of surprise to appellant that could not be adequately prepared for, and thus was prejudicial to appellant. If appellant had had any reasonable notice, the preparation of its case would certainly have been different. For example, rather than relying almost entirely upon depositions, which are generally ineffective as far as juries are concerned, at least one, if not two, of the witnesses who gave their testimony by deposition would have been present in person to testify. And since appellant's counsel was not well acquainted in Ketchikan, appellant was prejudiced by a lack of opportunity to secure any reasonably adequate knowledge of the jurors that were to serve in the case.

For the five and one-half months prior to the date of trial, appellant relied on the belief that there was to be no jury. If such reliance is an important factor in the reason for the provision in Rule 38(d) which provides that a demand for a jury once made cannot be withdrawn without the consent of the opposing party, then in all logic it ought to be as important a factor when a trial by jury is waived and neither party requests it. See *Moore's Federal Practice*, Vol. 5, Sec. 38.45, pp. 343-344. Even assuming that the Court had the authority to call a jury in the absence

of a motion by appellees, appellant was entitled in all fairness to a reasonable amount of advance notice. See *Ford v. Wilson Co.,* 30 F. Supp. 163, 166.

2. The Prejudicial Nature of the Court's Error.

It will, undoubtedly, be asserted by appellees that this ground cannot be claimed as error justifying a reversal for the reason that appellant was not prejudiced because the issue as to liability was decided in its favor. But this was, at the most, a mere hollow victory when one considers that appellant recovered no damages at all—not even the costs of suit. Hence, appellant submits that there was prejudice in this respect.

If this case had been tried by the Court, rather than by a jury, the Court would have been obliged to make specific findings of fact on the question of damages, and the absence of findings on that question would have been error because substantial. *Pacific American Fisheries v. Mullaney,* 191 F. 2d 137, 141 (CA-9 1951); *Owen v. Commercial Union Fire Ins. Co.,* 211 F. 2d 488 (CA-4 1954).

Assuming that the District Court's instruction on this point adequately disclosed the issues of fact that were before the jury, it cannot be truthfully said that upon a review of the evidence presented this appellate Court could possibly reach the same result as the jury did on that question. Appellant's loss of profits to which it was entitled if appellees' breach of contract was inexcusable was clearly established and uncontradicted; no reviewing Court could say that the proof

in this regard conceivably could give appellant as damages only $368.70—the exact amount of the admitted counterclaim. Thus, the reviewing Court could not waive the defect of an absence of findings on this point.

If the District Court had made findings of fact, as it ought to have done, then upon appeal this Court could review those findings and state whether or not the findings of fact on appellant's loss of profits were in accord with the evidence. This is because the findings of a Court are subject to a complete type of equity review—both of fact and of law. See *United States v. U. S. Gypsum Co.,* 333 U. S. 364, 394-395. This is a much broader type of review than is permitted where a jury's "findings" are considered on an appeal. In the latter type of case the kind of review is much more restricted, and where, as here, the question is as to the inadequacy of damages, it is not enough merely that there is proof that the amount of damages awarded is "substantially" less than what was established by the evidence. The inadequacy, according to decisions of this Court, must be shown to be "gross." See *Southern Pacific Co. v. Guthrie* (C.A.-9, 1951) 186 F. 2d 926, 932-933.

In the non-jury case this reviewing Court can make its review broad in scope, and reverse if the findings of the trial Court are not supported by the evidence or are against the weight of the evidence. In the jury case, however, all that this reviewing Court can do is to say whether the action of the trial Court in denying a motion for a new trial which is based upon

a verdict being against the weight of the evidence has abused its discretion; and where inadequacy of damages is in question, the reviewing Court will not find such an abuse of discretion unless the verdict is "grossly" inadequate. *Southern Pacific Co. v. Guthrie,* supra. Therefore, appellant submits that in this respect the error of the District Court in ordering that this case be tried by a jury was substantial and prejudicial to appellant.

II. THE DAMAGES AWARDED BY THE JURY WERE GROSSLY INADEQUATE.

Assuming, for the sake of argument that this action was properly tried by a jury, it is the position of appellant (1) that the issue of liability was correctly determined (that appellees had breached the contract without justification) when the jury rendered its verdict in favor of the appellant (R. 35), and (2) that appellant's loss of profits, or damages, in the amount of $21,489.57, was so conclusively proved that the action of the jury in awarding the appellant only the sum of $368.70 was a ground obligating the District Court to grant appellant a new trial on this aspect of the case.

1. The Record Established Appellant's Damages Beyond Dispute.

It was not disputed that under the contract the basic rate which appellees agreed to pay appellant for its daily news report started at $38.17 a week (R. 7,

88), and that throughout the term of the agreement this rate was increased by assessments made from time to time, as follows:

January 6, 1946	$1.15
December 29, 1946	3.05
January 4, 1948	3.09
January 9, 1949	2.06
January 7, 1951	4.75
May 3, 1953	4.18
Total	$18.28

(R. 92-95.)

These assessments were made by appellant, and appellees agreed to pay them, by virtue of the provisions of Paragraph Second, Clause 2 of the contract (R. 7-8, 88-89); and they represented general overhead expenses of appellant attributable to its entire business which were levied pro rata among all of appellant's clients based upon each client's weekly rate. This was clearly established by the testimony of David Belnap, the Northwest Manager for United Press Associations (R. 65-66, 190-191), and by Carl B. Molander, the Assistant General Sales Manager for United Press (R. 89-92), and appellees made no attempt to contradict these witnesses nor did they offer any evidence controverting these facts. Hence, on February 14, 1954, the date upon which appellees breached and repudiated the contract (R. 5, 59, 88, 239), the basic rate for the service rendered appellees had been increased by assessments totaling $18.28, and was then the total sum of $56.45 a week.

It is true that the actual rate then being paid by appellees on February 14, 1954, was $61.45 a week, or $5 more than the basic rate of $56.45. This, however, is readily explained, and there is no necessity for any confusion on this point. In order to satisfy demands of appellees for a more efficient type of news service, appellant employed a teletype operator to send the news reports from Seattle to appellees' newspaper in Ketchikan, Alaska, and appellees agreed that in addition to the basic contract rate of $38.17, they would pay the further sum of $52.50 a week toward the Seattle teletype operator's salary. (R. 14-15, 89, 222-224.) Later, at the insistence of appellees, appellant agreed to absorb $27.50 of such operator's salary, based upon a figure of $52.50 a week (R. 15-16, 89, 228-229), which meant that appellees' contribution to that expense of appellant was then $25 a week. Finally, on February 21, 1950, a "Modification of Agreement" was made by the parties (R. 17-18) and here appellant reduced the overall rate then being paid by the further sum of $20 a week. This $20 reduction could be considered as a further offset against appellees' contribution of $25 toward the salary of the Seattle teletype operator, and this then meant that after February 21, 1950—and on February 14, 1954, the date of appellees' breach of contract—appellees' contribution to this salary expense was only $5 a week. (R. 92-95.)

In computing this loss of profits—or damages—arising from appellees' breach of the contract, appellant considered this $5 item as appellees' contribution

toward the teletype operator's salary, and thus eliminated it from anticipated profits. (R. 94-95.) Hence, this sum was subtracted from the actual rate being paid by appellees at the time of breach, i.e., $61.45, and this then left the sum of $56.45 as the basis for computation of the loss of profits. (R. 95.) This same figure is reached by adding to the original basic rate of $38.17 the total of the general assessments made, that is, the sum of $18.28.

The basic rate to be paid by appellees under the contract at the time they repudiated the agreement being $56.45 a week, appellant's loss of profits, or damages, were to be computed on the basis of this figure, less the expense of furnishing the news report to appellees. This, as Mr. Molander has shown, was $8.66 a week—this representing the cost of renting a teletype machine and the cost of paper. (R. 95-96.) There was no saving to appellant as far as the teletype operator's salary was concerned. This was clearly shown by Mr. Belnap when he brought out in his testimony these facts: that at the time appellees breached the contract, i.e., on February 14, 1954, appellant's Alaska business required the services of two teletype operators in Seattle, whose salaries were paid by appellant; that the total costs to appellant for these two operators, which represented their total gross wages, was $308.04 per week; that the total gross revenue received by appellant from its Alaska business was $306.24 per week; and that after appellees' termination of the contract, and the news report was no longer being sent to the Ketchikan Daily News, there

was no saving to appellant in respect to operators' salaries, for the reason that the same two teletype operators had to be kept on for the remainder of appellant's Alaska business at their full salary. (R. 62-64.)

Consequently, the computation of appellant's loss of profits arising by reason of appellees' breach was a matter of simple mathematics: the basic rate ($56.45), less the cost of maintaining the news service to appellees ($8.66), multiplied by the number of weeks that the contract had to run at the time of breach (449 4/6 weeks). (R. 95-98.) Hence, appellant's damages for breach of contract here were $21,489.57. (R. 96-97.)

2. Appellant's Damages, as a Matter of Law, Could Not Be Disputed.

What appellant is entitled to in the way of damages is the value of the contract, for appellees cancelled the agreement and thereby prevented appellant from collecting the revenue to which it was entitled thereunder. The contract is express in its terms in that it provides for certain weekly payments over a period of time which is likewise certain, and those payments are neither remote nor speculative in any degree. Appellant is therefore entitled to recover what it would have received, diminished only by the expense that would have been required of it to furnish its news report to the appellees for the balance of the term. That expense, which is properly deductible from the contract price, can only be that which

appellant would have *saved* by reason of not being required to complete performance for the full term of the agreement. And it has been clearly shown that all that appellant would have saved—the only expenses that would have been incurred in furnishing the news report to appellees—was $8.66 per week. (R. 95-98.)

The assessments levied from time to time pursuant to the provisions of Paragraph SECOND, in the total amount of $18.28 per week, are referable to the appellant's overall business, and are not referable to this particular contract and are not deductible from the contract price. They are part of the general overhead expenses of appellant in maintaining and furnishing its services to all of its clients and were levied pro rata among all of such clients based upon each client's weekly rate. These expenses continue regardless of whether appellant is serving appellees or not, and thus appellant has saved nothing in this respect by not being required to furnish the news reports to appellees for the balance of the term.

This principle is inherent in the case of *Star-Chronicle Publishing Co. v. U.P.A.,* 204 F. 217 (CA-8, 1913). There, in a case involving breach of a similar type of contract, it was argued that in computing UPA's profits there should be deducted from what UPA was entitled to receive under the contract, not only the expense of maintaining the St. Louis office, but also a relative portion of the expense of the entire business of plaintiff. The Court, in holding against such contention, said (pp. 223-224):

"The evidence discloses that the only extra expense to which plaintiff was put in performing its contracts with defendant was the local expense incurred in maintaining the St. Louis office. All other expense incurred by it was the same after defendant ceased to accept the news."

Also, in another very similar case involving United Press Associations, the same point was covered. In *UPA v. McComb Broadcasting Corporation,* 28 So. 2d 575 (Miss. 1947), the Court had this to say (p. 576):

"* * * The association was entitled to the net profits which it thereby lost, computed upon the basis of the unexpired term of the contract. * * *

"Proof of anticipated profits was adduced by the southern division business representative of the association having supervision over the area in which the station was located. His testimony was uncontradicted that the gross rentals due the association were $45.85 per week, and that the expense of furnishing such services was $21.83 per week. Such expenses allocable to the station's services were broken down in detail. The net profit to accrue to the association was therefore $24.02 per week for 71 weeks, or $1,705.42.

"That such lost profits were properly computed, and should have been awarded, is sustained by established authority, typical examples of which are above cited. The attack upon the correctness of the award is directed to the failure to include in the expenses *deductible from gross profits an allocated portion of the general overhead expenses of the association in maintaining*

> *and furnishing its services.* Such attack is met by the requirement, born of practical considerations, that the defaulting party may not hold the promisee to more than a reasonable detail. Engle v. Mahlen, supra. In Star Chronicle Publishing Co. v. United Press Ass'n, supra, the trial court, in considering this question in a case strikingly similar to the case at bar in all its phases, had instructed the jury to fix damages for anticipated profits, if found, upon the basis of the contract price and the cost of maintaining the office of the appellant. * * * The testimony of the association's representative was clear, concise, and certain. There was flat assertion that the deductions included the entire expense incurred or required to service the station. We therefore amend the decree to allow recovery of such lost profits." (emphasis added.)

See also *Burd v. Campbell Hosiery Co.,* 28 Atl. 2d 365, 366 (Pa. 1942); *United States v. Behan,* 110 U.S. 338, 344-347; *Wicker v. Hoppock,* 73 U.S 94, 99.

It certainly does not lie in the mouths of appellees, who breached the contract, to claim that in computing damages appellant has to deduct from the contract price an allocated portion of the general overhead expenses of appellant in respect to its entire business. The appellees' anticipatory breach of contract estops them from claiming that anything more is deductible from the contract price than the appellant's actual savings due to its being relieved from the burden of performing the contract over the entire period thereof. *American Can Co. v. Garnett,* 279 F. 723, 727 (CA-9, 1922); *United States v. Behan,* 110 U.S. 338, 345-347.

Under these authorities it is inconcievable how it could even be considered that the several assessments totalling $18.28 are "costs" and therefore deductible in computing profits. Appellant was burdened with these same items of expense even after appellees had ceased to receive the news service, and appellees' breach of its contract, which expressly provided that they bear their proportionate share of the expenses, put it beyond the power of appellant to collect them from appellees. Appellees should, therefore, bear the burden of this particular expense as the result of their breach. Appellant had lost the $18.28 a week (along with the original basic rate of $38.17) which it otherwise would have collected from appellees as their just proportion of that expense. Certainly, appellant is entitled to recover any losses occasioned or proximately caused by the appellees' breach.

The same principles also prevent appellees from claiming that since appellant's gross revenue from its Alaska business was $306.24, and the cost of teletype operators for such business, $308.04, that appellant was thus losing money and therefore entitled to no "profits." The complete answer to any such contention, as in the case of the $18.28 in assessments, is that no saving resulted to appellant in respect to a teletype operator's salary when service to appellees was ended. Mr. Belnap testified that the day operator who transmitted the file to the Ketchikan Daily News received $144.48 per week, and that after appellees discontinued the service, this operator still had to be retained for other Alaska business at the same salary.

(R. 61-64.) Thus, not only was there no saving to appellant, but that portion of the operator's salary which appellees had agreed to pay in addition to the basic rate plus assessments, was an additional expense which appellant had to absorb after the appellees discontinued service.

In line with the *Star-Chronicle* and *McComb* cases, supra, appellees can take nothing from the fact that appellant's Alaska business or its business as a whole was profitable or unprofitable. All that is involved here is this particular contract, and appellant's damages are measured by the value of the contract alone, and not by any standard of what UPA receives from its other Alaska clients or by whether those receipts were profitable or unprofitable in the overall operation. UPA has profitable contracts and unprofitable contracts in its business, and it may very well be that its Alaska business as compared with its continental business is generally unprofitable. But appellees, who breached the contract, certainly should be estopped from raising these questions; for all that is involved in this case is what appellant has lost by reason of appellees' breach of this particular contract. See *American Can Co. v. Garnett,* 279 F. 723, 727. Appellant is entitled to any losses occasioned or proximately caused by appellee's breach, and entirely aside from whether its Alaska business is operating at a profit or not.

From these things it is apparent that the damages awarded by the jury were so wholly inadequate that the trial Court's denial of appellant's motion for a

new trial on the issue of damages could not have been in the exercise of a reasonable discretion.

III. THE DISTRICT COURT ABUSED ITS DISCRETION IN REFUSING TO GRANT A NEW TRIAL ON THE ISSUE OF DAMAGES.

Still assuming, arguendo, that this case was properly tried by a jury, there is abundant reason to reverse the judgment because of the abuse of discretion in the Court below in refusing to grant appellant's request for a new trial on the issue of damages. That abuse of discretion relates to the damages awarded by the jury—the position of appellant being that the amount awarded was so wholly inadequate and so entirely inconsistent with the uncontradicted evidence as to make it manifest that this part of the verdict resulted from a complete disregard by the jury of the Court's instructions, which creates an inference of prejudice against appellant.

Instruction No. 4 of the Court's Instructions to the Jury tells the jury that if they find that appellees wrongfully breached the contract, they may allow appellant damages for the period February 15, 1954 to September 27, 1957, in an amount equal to the amount that appellant would have earned during that period, less the amount it would have cost the appellant to perform the contract, and less the sum of $368.70—the amount of appellees' counterclaim. (R. 30.) This Instruction further informs the jury of the various factors they may consider in determining the amount

of damages. (R. 30-31.) The Instruction then continues that if the jury should find that appellant failed to furnish appellees with the news agreed upon, the jury would be warranted in finding that appellees were justified in rescinding the contract and that the verdict should then be for appellees. (R. 31.)

Under this Instruction the jury had one of two choices: (1) either to find for appellant and award damages, or (2) to find for appellees, in which case appellant would be entitled to no damages. And if the verdict was to be in appellant's favor, then the damages would of necessity be substantial; for as pointed out in Part II of this brief (supra), the amount that appellant would have earned during the unexpired term of the contract and the cost that it would have been put to in performing the contract were so conclusively established by the evidence that as a matter of law the jury was obligated to simply make the mathematical computation of multiplying appellant's weekly net profit by the number of weeks that the contract had to run—and thus arrive at the figure based upon the proof adduced, proof over which there was no controversy.

Consequently, although the jury found in appellant's favor with respect to liability, it did not assess appellant's damages in the manner directed by the Court's Instructions. It thus completely ignored such Instructions and failed to perform its task of assessing damages. The conclusion, then, is inescapable that the verdict so far as damages were concerned was not motivated by the evidence, but rather was the

result of capricious and arbitrary action, in total disregard of the evidence, thus giving rise, on its face, to an inference of prejudice on the part of the jury. Under these circumstances the trial judge ought to have granted a new trial, and his failure to do so was an abuse of discretion—an error of law.

United Press Associations v. National Newspaper Ass'n, (CA-8, 1918), 254 F. 284, 286; *Reisburg v. Walters,* 111 F. 2d 595, 598 (CA-6, 1940); *Wetherbee v. Elgin, Joliet & Eastern Ry. Co.,* 191 F. 2d 302, 310 (CA-7, 1951), certiorari denied, 346 U.S. 867; *Barnsdall Refining Corp. v. Cushman-Wilson Oil Co.,* 97 F. 2d 481, 485 (CA-9, 1938).

It is submitted that the inadequacy of damages here is in the true sense of the term "gross," and thus that the action of the Court below in denying appellant's motion for a new trial must be reversed by this Court. *Estabrook v. Butte, Anaconda & Pacific Ry. Co.,* 163 F. 2d 781-782 (CA-9, 1947); Cf. *Covey Gas & Oil Co. v. Checketts,* 187 F. 2d 561, 562-563 (CA-9, 1951); *Cobb v. Lepisto,* 6 F. 2d 128, 129 (CA-9, 1925); *Baldwin v. Warwick,* 213 F. 2d 485, 486 (CA-9, 1954).

IV. ERRORS IN THE DISTRICT COURT'S INSTRUCTIONS TO THE JURY WERE PREJUDICIAL AND JUSTIFY THE GRANTING OF A NEW TRIAL.

It is the position of appellant that the District Court, in Instruction No. 4, gave erroneous instruc-

tions to the jury in these two instances: (1) in r
ducing the term of the contract by a period of fi
years (R. 30), and (2) in permitting the jury to co
sider certain elements in its determination of th
amount of damages to be awarded appellant. (R. 3
31.) Both of such errors were prejudicial to appella
and justified the granting of a new trial.

1. The Instruction on the Term of the Contract.

Over the objections of appellant, the Court i
structed the jury as a matter of law that the term
the contract between appellant and appellees e
pired on September 27, 1957, rather than, as appe
lant has always claimed, five years later, that is,
September 27, 1962. This, appellant maintains, wa
error.

The history of the contract, as shown by the ev
dence (see Exhibit A attached to appellant's com
plaint (R. 6-18) and the deposition of Carl Molander
(R. 84-86, 95) and as it relates to the ultimate expir
tion date of the contract, is this:

(a) The original agreement went into effe
on October 3, 1945, and was for a period of thr
years, i.e., until October 3, 1948. (R. 10, 84.)

(b) On October 3, 1948, notice of terminatio
not having been given pursuant to Paragrap
EIGHTH, (R. 10, 84-86) the term was extende
for an additional five-year period, i.e., until O
tober 3, 1953.

(c) On February 21, 1950, the parties entere
into a "Modification of Agreement," under th

terms of which appellant agreed to suspend the then existing rate and reduce it by $20.00 per week, with the provision that either party could terminate such suspension on thirty-days' notice. Clause 3 of this "Modification of Agreement" reads as follows:

> "3. The term of the agreement between the parties shall be extended by the length of time during which the above suspension is in effect." (R. 17-18.)

(d) On October 3, 1953, the contract was still in effect, no notice of termination having been given pursuant to Paragraph EIGHTH. (R. 85-86.)

(e) On February 14, 1954, appellees breached and terminated the contract by refusing to accept service thereunder. (R. 88, 239.) This, of course, also constituted a termination of the "Modification of Agreement" of February 21, 1950, and as of the date of such termination, February 14, 1954, the rate suspension under the Modification had been in effect for a period of four years less five days.

In view of these facts, appellant's contention is that on October 3, 1953, the contract was automatically renewed by its express terms for an additional five-year period, i.e., until October 3, 1958; that on the date of termination, February 14, 1954, the "term of the agreement," within the meaning of Clause 3 of the Modification of Agreement, was a term which expired on October 3, 1958; and that since on February

14, 1954, the rate suspension under the Modification
Agreement had been in effect for a few days less th
four years, the "term of the agreement" which w
to expire on October 3, 1958, was thus extended
virtue of the provisions of the Modification of Agr
ment for an additional period of nearly four years
that is until September 27, 1962.

On the other hand, the Court in instructing the ju
on this subject, (R. 30), although recognizing the a
tomatic renewal date of October 3, 1953, simply
nored Paragraph EIGHTH of the contract where
the term would thus be extended for another five-ye
period, that is until October 3, 1958, and simply add
on, commencing October 3, 1953, the period duri
which the rate suspension was in effect—thus maki
the expiration date September 27, 1957, rather th
September 27, 1962—a difference of five years.

The Court's interpretation was not logical. If t
Modification of Agreement had not existed, then t
Court would have had to admit (since it recogniz
the automatic renewal date of October 3, 1953), th
the contract, by its express terms, would have be
extended at that time for an additional five-ye
period, and that when appellees terminated the co
tract on February 14, 1954, that period would n
have expired until October 3, 1958. It simply is n
reasonable to thus construe the Modification of Agr
ment as shortening the minimum that appellant w
entitled to under the terms of the original agreeme
rather than extending it; and yet that is precise
what the Court did.

This cannot be correct. The "term of the agreement," referred to in Clause 3 of the Modification of February 21, 1950, must have meant the "term" as it existed as of the date of termination of the Modification, i.e., when appellees breached the contract on February 14, 1954. "Term" means a "limited or definite extent of time; the time for which anything lasts; duration; tenure" (See Webster's Dictionary), and on February 14, 1954, the time for which the original agreement was to last—its duration—was until October 3, 1958, since it had been automatically renewed for a five-year period on October 3, 1953. This was the "term of the agreement" which, by virtue of the provisions of the Modification, was extended by the length of time the rate suspension under such Modification was in effect.

There is no ambiguity here; no room for the strained construction adopted by the Court; no reason to believe that the parties did not mean exactly what they said. Under the Modification of Agreement appellant gave appellees a substantial rate reduction, and the parties must reasonably have intended that appellant was to receive some value for this. This value, or consideration, was that appellees would bind themselves to the agreement for a period of time longer than that provided for in the original contract. But if the District Court's interpretation is followed, appellees would have all of the advantage, and appellant none.

The agreement, thus interpreted by the lower Court, is not only inequitable and unjust as far as appel-

lant is concerned, but is also absurd for the reas
that it is contrary to common sense to believe th
appellant would have made a substantial rate red
tion and would receive nothing in exchange. If am
guity exists and construction is necessary and jus
fied, which appellant does not admit, then a rule
construction should be preferred which would ma
the entire agreement, that is, the original contra
plus the Modification of February 21, 1950, ratio
and not contradictory of its general purposes. See
Am. Jur. 792, Sec. 250; *Lescher & Sons Rope Co.*
Mayflower Gold Mining and Reduction Co., 173 F
855, 857. That construction of a contract which affo
protection to both parties, rather than only to o
should be favored. See *Knight v. Hamilton,* 313 F
858, 233 SW 2d 969; *Jenkins v. Anaheim Sugar C*
247 Fed. 958, 960.

2. Instruction on Elements of Damages to Be Considered.

As part of its Instruction No. 4 the Court told
jury this:

> "In determining the amount of damages, if y
> find that plaintiff is entitled thereto, you m
> consider . . . the probability of change during
> period referred to in the rates, the cost of do
> business, and the margin of profit . . . " (R.
> 31.)

This portion of the Instruction was erroneous
only because it was too broad, but also because it w
confusing and conducive to improper speculation
the part of the jury. It does not clearly instruct
jury that appellant's lost "profits", or damages, w

the contract price, less the expense of furnishing the news report to appellees for the balance of the term of the contract. It has been pointed out in this brief (see Part II, supra) that the contract price and the cost of furnishing the news service to appellees for the balance of the contract term were specific, definite amounts, and established by uncontradicted evidence; and that as a matter of law the difference between the two figures was the measure of appellant's lost profits, or damages. See *UPA v. McComb Broadcasting Corp.,* 28 So. 2nd 575, 576 (Miss. 1947); *Star-Chronicle Publishing Co. v. UPA,* 204 F. 217 (CA-8, 1913). But the Instruction did not make this clear; it failed to point out that the "cost" or expense that may be deducted from the contract price in determining net lost profits is limited solely to those items relating specifically to the performance of the contract and could not include the expense of a Seattle teletype operator or other general expenses of appellant in maintaining its Alaska business. Because, then, of these principles, inherent in the *McComb Broadcasting Corp.* and *Star-Chronicle* cases, supra, the Court was bound to be more specific in its Instructions, and not to have instructed the jury to consider generally "the probability of change . . . the cost of doing business, and the margin of profit . . ." (R. 30-31.)

Finally the Court also instructed the jury that in determining the amount of damages it could consider—

> " . . . The probability or improbability that the defendants would remain in business." (R. 31.)

This was error because it constituted an instruct
on the impossibility of performance of the contr
by the appellees if they went out of business dur
the unexpired term of the agreement. Subjective
possibility, or inability to perform because of pove
loss of money or inability to obtain money, does
excuse nonperformance of a contract. In order to
lieve appellees from performance of their contr
because of impossibility, the impossibility must
inherent in the nature of the act to be performed,
not consist of the personal inability of appellees
carry out their bargain. The latter type of "imp
sibility", which is purely subjective, was what
Court was presumably instructing on, and since
does not discharge a duty created by contract, it
erroneous. See 12 Am. Jur. "Contracts", Sec. 3
Restatement, Contracts, Vol. 2 Sec. 455; *Williston*
Contracts, Rev. Ed., Vol. 6, Sec. 1932, pp. 5411-5
The burden was on appellees to establish a defens
excusable impossibility, if they could, and the rec
shows that they did not even suggest that such a
fense existed. See *Williston,* supra, Sec. 1937, p. 5

3. Conclusion.

The jury, in rendering its verdict in favor of ap
lant, found that appellees had wrongfully breac
the contract—were not justified in rescinding it. O
that decision had been made, then had the jury b
instructed properly on the element of damages
could only have determined, in the light of the pr
adduced at the trial, that appellant's loss of pro
would be the weekly contract price at the time of
breach ($56.45), less the cost of performing the

tract ($8.66), multiplied by the number of weeks that the contract had yet to run (449 4/6). (R. 95-96.) As a matter of law the District Court erred in not correctly instructing the jury on this aspect of the case, and it is manifest that this failure on the part of the trial judge could well have led to the absurd result where the damages awarded appellant were exactly equal to the amount of the admitted counterclaim of appellees. The gross inadequacy of the verdict, then, could well have been the result of erroneous instructions by the Court below, and this alone would be sufficient reason for this reviewing Court to reverse the action of the trial Court in denying appellant's motion for a new trial. See *Chesapeake & Ohio Ry. Co. v. Gainey,* 241 U. S. 494, 496 (1915); *Legler v. Kennington-Saenger Theatres, Inc.,* 172 F. 2d 982, 984 (CA-5, 1949).

V. A NEW TRIAL SHOULD BE LIMITED TO THE ISSUES OF DAMAGES.

Appellant's case was that appellees breached the contract without justification, and the only defense that was relied on by appellees at the trial was that appellant had itself breached the contract by failing to furnish an adequate news report. When the jury returned a verdict for the appellant, it must have determined from the evidence presented that the appellant had kept its part of the bargain, and therefore, that appellees' renunciation of the contract was not excusable.

The facts in this case upon which such determination was based could have no conceivable connection

with the elements of proof required for a computati
of appellant's damages, i.e., the amount of money th
it lost by reason of appellees not accepting the serv
under the contract for the balance of the unexpi
term thereof. Hence, the two issues in this case—
of liability and the other of damages—are distinct a
separable, and not so inextricably related so that
proper verdict on the latter cannot be reached witho
taking into account the evidence relating to the f
mer. Evidence proving appellees' unjustified brea
cannot have the slightest bearing on the amount
profits that appellant has lost by reason of the brea
Therefore, the issue of damages can be retried alo
without any injustice. In fact, it would be an injust
and unduly burdensome to compel appellant to re
the issue of liability in view of the jury's verdict
its favor on that issue, the correctness of which app
lant does not challenge. *Yates v. Dann,* 11 FRD 3
(D. C. Del. 1951); *Greater American Indemnity Co.
Ortiz,* 193 F. 2d 43, 47 (CA-5 1951); *Washington G
Light Co. v. Connolly,* 214 F. 2d 255, 256 (CA-I
1954). Cf. *Gasoline Products Co., Inc. v. Champ
Refining Co.,* 283 US 494, 498-500.

**VI. RATHER THAN GRANTING A NEW TRIAL, THIS COU
SHOULD DIRECT THE ENTRY OF JUDGMENT FOR APP
LANT IN THE UNDISPUTED AMOUNT.**

The jurisdiction granted the federal Appella
Courts is broad, Section 2106 of the Judicial Co
(28 USCA Sec. 2106) providing as follows:

> "The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances."

Hence, in dealing with a judgment of a District Court, this Court is not limited to remanding, with directions to award a new trial, but has the authority in a proper case to render a correct judgment after a reversal of the judgment of the trial Court.

It is appellant's position that this is what ought to be done here, i.e., that the judgment below should be reversed for the reasons heretofore stated, and that this Court should then proceed to enter, or direct the entry of, a judgment in favor of appellant for the undisputed amount of damages to which appellant is entitled. And, in taking this stand, appellant is not asking the Court to employ the device of *additur* which, under substantial federal authorities, is not favored. *Dimick v. Schiedt,* 293 US 474, 475 (1935); *Moore's Federal Practice,* Vol. 6, p. 3752, Sec. 59.05(4); id. p. 3840, Sec. 59.08(6). *Additur* assumes a dispute as to the amount of damages; and as has already been pointed out in this brief the correct amount of damages to which appellant was entitled cannot be disputed but is a mere matter of calculation.

It has already been shown in this brief that the contract is express in its terms in that it provides for

certain weekly payments over a period of time th
is likewise certain, and that those payments are n
ther remote nor speculative in any degree. The tes
mony of appellant's witness, Mr. Molander, was u
contradicted that had appellant been required to fu
nish its news report to the appellees for the balar
of the unexpired term, appellant would have receiv
the sum of $56.45 per week, less costs of furnishi
service in the amount of $8.66, or a net amount
$47.79 per week. (R. 95-96.) Likewise, it was ind
putably established that appellees breached the co
tract on February 14, 1954, and as of that date t
unexpired term of the contract was a definite numb
of weeks. (R. 95.) The testimony on both of the
matters was clear, concise and certain, and appell
made no attempt either by affirmative proof or
way of impeachment or contradiction to dispute the
facts. Hence, the ascertainment of appellant's da
ages becomes merely a matter of mathematical co
putation, i.e., the sum of $47.79 multiplied by t
number of weeks that the contract still had to ru
According to appellant's construction of the Modifi
tion of Agreement of February 21, 1950 (R. 17-1
the number of weeks remaining was 449 and 4
(R. 95) and thus appellant's damages amounted
$21,489.57.

Under the evidence, then, appellant was entitled
$21,489.57, if it was entitled to anything, and sin
the jury properly determined liability in favor
appellant, the amount awarded was simply less th
that which was undisputed. And since this amou

was not factually in dispute, there is nothing to prevent this Court from rendering judgment in favor of appellant for the undisputed amount. This would not violate the rule against *additur,* for there is no real factual issue on the question of damages to be tried. The Court would not be substituting its own judgment for that of the jury but would be merely adding to the verdict that amount of lost profits which appellant is entitled to as a matter of law. *Stanton Electric Mfg. Co. v. Klaxon Co.,* 125 F. 2d 820, 825, 826 (CA-3, 1942); *Marshall v. Equitable Life Assurance Society,* 116 F. 2d 901, 903 (CA-6, 1941); *United States v. Illinois Surety Co.,* 226 F. 653, 664 (CA-7, 1915); *UPA v. McComb Broadcasting Corp.,* 28 So. 2d 575, 576 (Miss. 1947); *Moore's Federal Practice,* Vol. 6, pp. 3748-49, Sec. 59.05(3); id. p. 3755, Sec. 59.05(4); id. p. 3804, Sec. 59.08(4). Cf. *Garfield Aniline Works v. Zendle,* 43 F. 2d 537, 538 (CA-3, 1930). See also: *Wilson v. Brown,* 136 Va. 634, 118 S.E. 88, 90 (1923); *Citizens' Nat'l Bank v. Joseph Kesl & Sons Co.,* 378 Ill. 428, 38 NE 2d 734, 737 (1941); *Oliver v. Crane,* 182 Or. 166, 161 P. 254, 255 (1916); *Mystic Tailoring Co. v. Jacobstein,* 94 Colo. 306, 30 P. 2d 263, 264 (1934).

CONCLUSION.

For the reasons stated it is respectfully submitted that the judgment of the District Court should be reversed, and that this case should be remanded with directions to enter judgment in favor of appellant in

the sum of $21,489.57, together with appellant's co
and attorneys' fees.

Dated, Juneau, Alaska,
January 25, 1956.

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